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Supreme Court of the United States,

OCTOBER TERM, 1899.

Filed Mar. 14, 1900.

THE UNITED STATES
v.
THE CHOCTAW NATION ET AL.
No. 337.

THE WICHITA AND AFFILIATED BANDS OF INDIANS
v.
THE CHOCTAW NATION ET AL.
No. 338.

THE CHOCTAW NATION ET AL.
v.
THE UNITED STATES ET AL.
No. 329.

APPEALS FROM COURT OF CLAIMS.

Supplemental Brief for Choctaws and Chickasaws.

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Appeals from Court of Claims.

SUPPLEMENTAL BRIEF FOR CHOCTAWS AND CHICKASAWS.

I.

Duress.

The attorney general, in his oral argument, conceded that the Choctaws and Chickasaws were placed under duress by the United States, in the negotiation of the treaty of 1866. In effect, he conceded that this treaty was extorted from them by the United States. But he

reminded the court that our late treaty of peace was extorted from Spain, by the United States. He suggested that the Choctaws and Chickasaws demanded a reformation of the treaty on the ground of duress. And he insisted that, as in the case of Spain, so also in the case of these Indians, international law interdicted the reformation of treaty stipulations, on the ground of duress put upon one of the parties to the treaty. His opinion apparently is that the relation between the United States and the Choctaws and Chickasaws, at the close of our civil war, was identical with the relation which exists between a victorious sovereign state and a vanquished sovereign state, at the close of an international war, and that this relation justified the United States in extorting from the Choctaws and Chickasaws an absolute title to 7,000,000 acres of land in the leased district, without any compensation therefor. He seems to be of the opinion that, inasmuch as a majority of the Choctaws and Chickasaws sided with our southern citizens, in a war waged, not between two sovereign powers, but between citizens of the same nation, the relation of the Choctaws and Chickasaws to the victorious government, at the close of the war, was identical with the relation which exists between the conqueror and the conquered, at the end of an international war.

It would have been difficult, I think, for the attorney general to state a rule based on more solid principles of international law than the rule that mere duress, imposed by a victorious sovereign state upon a vanquished sovereign state, in the negotiation of a treaty of peace, at the close of an international war, constitutes no valid ground for the reformation of the treaty. If such were not the law, it would never be possible to make a binding treaty of peace.

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But I am not convinced that the relation between the victorious government of the United States and the Choctaws and Chickasaws, at the close of our civil war, was identical with the relation of the conqueror to the conquered, at the close of an international war,—that is to say, with the relation of the United States to Spain, at the end of our recent war. Our civil war was not a war between sovereign nations. The belligerents, on both sides, were citizens of the same nation. The Choctaws and Chickasaws took both sides. The majority of these Indians sided with the southern minority of our white citizens, the minority sided with the northern majority. If it can be truly said that, during that war, the northern majority constituted a sovereign power, a nation, the attorney general will hardly contend that the southern minority constituted a sovereign nation, at the outbreak of the war, or during the war, or at its close. And unless a mere handful of Choctaws constituted a sovereign power waging war against 2,000,000 of our northern soldiers, there was no sovereign nation opposed to the north in that war.

The Choctaws and Chickasaws do not ask for a reformation of the treaty of 1866, on the ground that duress was put upon them by the United States, in the negotiation of that treaty. The only effect of that duress suggested by them is this: In the Choctaw case, 119 U. S. 1, 27, this court prescribed the following rules for the interpretation of Indian treaties:

> As was said by this court recently in the case of United States *v.* Kagama, 118 U. S., 375, 383: "These Indian tribes are the *wards* of the nation; they are communities *dependent on the United States;* dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. *From this very weakness and helplessness*, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised,

there arises the *duty of protection* and with it the power. This has always been recognized by the executive and by congress, and by this court whenever the question has arisen."

The recognized relation between the parties to this controversy, therefore, is that between a *superior* and an *inferior*, whereby the latter is placed *under the control* of the former, and which, while it authorizes the adoption, on the part of the United States, of such a policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing; and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules, framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws.

The counsel for the United States contend that these rules, although they were applicable to the treaty of 1820, are not applicable to the treaty of 1866. They allege that, although these Indians were an "unlettered people" in 1820, they were not an unlettered people in 1866. As evidence of their "lettered" condition in 1866, the attorney general says that they are represented in the bar of this court in 1900. Thirty-three years have elapsed since 1866, and yet no Choctaw, or Chickasaw, is, or has been, to my knowledge, a member of the bar of this court. The counsel insist that it was the relation of *knowledge to illiteracy* that constituted the basis of the foregoing rules of this court. On the contrary, we think that the basis of these rules, as expressly announced by the court, is not the relation of *knowledge to illiteracy*, but is the relation of *sovereignty to dependence*, of *strength to weakness*, of *power to helplessness*, of *superiority to inferiority*, of the *guardian to the ward*. And we contend that there is stronger reason for the application of these rules to the treaty of 1866 than for their application to the treaty of 1820, because the treaty of 1866 was, in fact, extorted by duress from the Choctaws and Chickasaws. We have imputed to that duress no other bearing upon the issues in the case at bar.

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I am unable to see upon what ground it can be plausibly contended that the rule of international law, which excludes the reformation of a treaty between independent sovereign nations, on the mere ground of duress, also excludes proof that a deed absolute upon its face is, in fact, a conveyance in trust, or a mortgage,—that a deed from a ward to his guardian, absolute on its face, is a mortgage, or a deed in trust. I cannot understand how this rule of international law can, in any way, or to any extent, impair or interfere with our right to show, by legitimate proofs, that a deed from the Choctaws and Chickasaws, even if absolute upon its face, is, in fact, a conveyance in trust. In a proper case, would it not be lawful for this court to permit a cession by one sovereign to another, although on its face absolute, to be shown, by legal proofs, for the purposes of the case, to be a conveyance in trust? How could such judicial action possibly conflict with the rule which interdicts the reformation of treaties between sovereign States on the mere ground of duress?

II.

Measures of the value of the land.

In order to show the court how little the land west of the 100th meridian was worth in 1855, and how little the leased district was worth in 1866, the attorney general, in his oral argument, stated that in 1803 France ceded the entire province of Louisiana to the United States, for the sum of sixty millions of francs. There was a slight inaccuracy in this statement. But that is immaterial. The amount paid was eighty millions. In 1803 Napoleon Buonaparte was First Consul of the French republic. As such he ceded Louisiana to the United States. Why

did he part with the province? Why did he sell it at such an insignificant price? The answers to these questions will be found in documents printed on pages 547 to 552 of volume 2, American State Papers, Foreign Affairs, which documents are copied on pages 121, 122, 123 of my brief in Cause No. 338.

Buonaparte was about to engage in a long and bloody war with England France and England were both preparing for the inauguration of the momentous struggle. He foresaw that, upon the breaking-out of war, England would seize New Orleans. He knew that the seizure of New Orleans meant England's permanent acquisition of the province of Louisiana. He knew that he was powerless to resist the British fleet. President Jefferson proposed to purchase New Orleans. He did not ask for, nor did he desire a cession of Louisiana. But M. Talleyrand, the French minister, said to Mr. Livingston, the minister of the United States, that, if France should part with New Orleans, the rest of the province would be of little value to France, and urged upon him the purchase of the entire province. The result was that the sale was made on the 30th day of April, 1803. Eighteen days thereafter the king of England declared war against France. Before the middle of March, Buonaparte had said to the British ambassador in Paris, "I must either have Malta or war." On the 17th of March, Minister King had written, from London to Secretary Madison: "War seems more and more probable. Indeed it seems inevitable." Before the end of March, Mr. Addington, the British minister, had said to Mr. King, that if war should break out, one of the "first steps" of the English would be to seize New Orleans. Buonaparte preferred to sell Louisiana for a song, to a friendly power, rather than see it forcibly seized by the hereditary enemy of France. In

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view of these facts, was it reasonable for the attorney general to measure the value of the leased district and the land west of the one hundredth meridian, by the price for which Buonaparte sold Louisiana?

But then, between the year 1803 and the years 1855 and 1866, great changes had been wrought in the province of Louisiana. States had been erected. Territories had been organized. Populous cities had appeared. Vast interests had been developed. Was it reasonable to measure the value of these lands, in 1855 and 1866, by the price paid for Louisiana by President Jefferson, or by the price by which land could have been bought, in that province, in 1803? Would it not be as reasonable to measure the value of a square foot of land on Massachusetts Avenue, or Connecticut Avenue, in Washington, in the year 1900, by the price at which the same land could have been bought in 1803?

Again, in order to show how little the leased district was worth in 1866, my brother Lipscomb, in his oral argument, asserted that the Choctaws and Chickasaws made a present of that district to the Confederate States, in 1861. If he meant anything pertinent to this case, he meant that the Choctaws and Chickasaws executed a gratuitous and absolute conveyance of the entire beneficial ownership of that district to the Confederate States. But nothing could have been further from the truth of history. The transaction was not an absolute conveyance of the land. It was merely a substitution of one government for another, in the lease of 1855. The condition to settle friendly Indians on the land was expressly continued. The lease, which had been perpetual, was made terminable at the expiration of a period of time, therein limited. If any consideration had been paid for the lease, by the United States, it enured to the ben-

efit of the Confederate States. But in the treaty the Confederate States stipulated to pay the Choctaws and Chickasaws the sum of $3,124,947.98, without designating the consideration for that payment. That the transfer of the lease entered into that consideration can admit of little doubt.

I submit that the attempt to transform this lease into an absolute conveyance, and thereupon to make this fabricated conveyance a measure of the value of the leased district in 1866, must necessarily fail.

III.

The Trust.

I am unable to find, either in the United States, or in the Choctaw or Chickasaw nation, any constitutional or statutory authority for the application of the English statute of frauds to this case. I am not advised of any reason why a trust may not, in this case, be proven, as well as created, by parol. But, for the purposes of this argument, I will concede the applicability of the statute of frauds to the case. That concession is, of course, unfavorable to the Choctaws and Chickasaws. I will concede that, in this case, an acknowledgment of an express trust, in order to be legal proof of the trust, must be in writing. I submit, then, that the following propositions are sound in law:

If A, by deed, convey land to B, in trust for C, without otherwise defining the trust, the law will recognize, in these words, a full, clear and accurate definition of the trust. It will be an express trust, of the class known as "general," "simple," or "dry" trusts. The naked legal title will vest in the trustee; but the entire beneficial in-

terest will vest in the *cestui que trust*. The trustee will be accountable for the rents and profits of the land while he holds it, and for its proceeds, if he dispose of it; and he must faithfully endeavor to secure full values in either case. If B, by an instrument in writing, referring to and identifying A's deed, acknowledge it to be a deed in trust, without otherwise defining the trust, and without naming the *cestui que trust*, he will, in effect, acknowledge the trust to be a general, or simple, trust in favor of C.

If A, by a deed absolute on its face, convey land to C, with no declaration of trust and no designation of the *cestui que trust* in the deed, but, at the same time, declare, by parol, a general, or simple, trust in favor of C, the deed will be valid in law, but must be proven by a written instrument. If B, then, by a written instrument, referring to and identifying A's deed, acknowledge it to be a deed in trust, without otherwise defining the trust, and without designating the *cestui que trust*, his acknowledgment will be proof that the trust is a general, or simple, trust in favor of C.

If A, by deed, convey land, in trust for himself, to B, the deed will be valid. The trust will be a general, or simple, trust; and A himself will be the *cestui que trust*.

If A, by a deed absolute on its face, convey land to B, and thereafter B, by a written instrument, referring to and identifying A's deed, acknowledge it to be a deed in trust, without otherwise defining the trust, and without designating the *cestui que trust*, then, in the absence of legal proof defining the trust and designating the trustee, B's acknowledgment will be legal proof that the trust is a general, or simple, trust, and that the grantor, A, is himself the *cestui que trust*.

If, from the case at bar, our claim and proof that the trust is a special trust, to settle Indians on the land, were

eliminated, then the acknowledgment made by the United States in the act of 1891, declaring that the cession of 1866 was a cession in trust, would be an aknowledgment that the trust was a general, or simple, trust, and that the Choctaws and Chickasaws themselves were the beneficiaries of the trust.

In that case, the United States would be accountable to the Choctaws and Chickasaws for the rents and profits of the land held by the United States between the years 1866 and 1900, and for the proceeds of sales of lands disposed of, and would also be held to reasonable care and diligence in the management of the estate.

But our claim and proof that the trust is a special trust, to settle Indians on the land, has not been eliminated from this case, and, therefore, the acknowledgment, made by the United States in 1891, that the cession of 1866 was a cession in trust, is an acknowledgment that the trust is a special trust, to settle Indians on the land.

This alternative, therefore, confronts the United States. If the attempt to exclude our claim and proof that the cession of 1866 was a cession in trust, to settle Indians on the ceded land, shall fail, the liability of the United States will not exceed, in extent, the compensation per acre heretofore paid, in like cases, to the Choctaws, Chickasaws, Creeks, and Seminoles. But if that attempt shall succeed, the government will become the trustee of a general, or simple, trust, accountable for rents, profits, and proceeds of sale; and the sum total of its indebtedness to the Choctaws and Chickasaws will be very great. Its magnitude may be approximately estimated upon consideration of the following statement, contained in the report of the senate committee on the special message of President Harrison relating to the Cheyenne and Arapahoe case, which statement is printed on pages 207 and 208 of the Appendix to the Record:

The commissioners having, in pursuance, as your committee infer, of the instructions of the Secretary of the Interior, refused to negotiate with the Choctaws and Chickasaws for the relinquishment of their interest in the "leased district," the governor of the Chickasaw Nation, it appears, sent B. C. Burney and Overton Love, citizens of that nation, to Washington to apply to Congress for protection against the threatened invasion of their rights. Your committee are informed that before making their formal application to congress the Chickasaw delegates, Messrs. Burney and Love, had an interview with a well-known financier and capitalist, now a distinguished member of the executive department of the government, in which he said to them that, if they could obtain from congress authority to sell the lands embraced within the "leased district" at private sale, a syndicate could be organized to purchase them at the price of $5 per acre, at which rate the lands, being in area 7,713,239 acres, would amount to $38,566,190, and at the same time he expressed the opinion that the proposed syndicate would be able to sell the lands for $10 per acre, at which rate the lands would have yielded the syndicate a profit of more than $35,000,000.

The trust in this case is of an unusal character. There are three beneficiaries. Such Indians as the United States should select were to become beneficiaries, because they were to have homes on the land. The Choctaws and Chickasaws were to be beneficiaries, because they were to secure a "buffer" of red men on their western border. And the government of the United States was to become a beneficiary, for it was to secure land for the colonization of other Indians. Moreover the conveyance was a conditional conveyance as well as a conveyance in trust.

I think that this cession is not absolute on its face. I believe it to be an indisputable principle of law, that when the *apparent* meaning of terms used in a contract involves injustice and absurdity, that fact alone suffices to raise a doubt as to the *real* meaning of the contract, and it becomes competent for the court to ascertain that meaning, by recourse to outside facts. I believe that this cession of 1866, if it were absolute, would involve most monstrous injustice and absurdity. As a result of such a cession, the United States would have acquired from these Indians more than 15,000,000 acres of land, worth more than $50,000,000, for the sum of $800,000, and, without the pay-

ment of a single dollar, would have secured the substitution of an *absolute title* to more than 7,000,000 acres of the land in the leased district, in lieu of a mere *lease* which was subject to the following conditions, viz: (1) that the land should be used for Indian settlement; (2) that the Choctaws and Chickasaws themselves should retain the right to settle on the land; (3) that the land should remain a part of the Choctaw district; (4) that the Choctaw government should retain jurisdiction over Choctaws and Chickasaws residing in the district; and (5) that no regulations should be enforced, in the district, inconsistent with the rights and interests of the Choctaws and Chickasaws.

In my judgment, therefore, this cession is not on its face absolute. But, then, if it were absolute, or should be held by the court to be absolute, it would, nevertheless, be subject to the rule under which a deed, absolute on its face, may be shown, by legal proofs, to be a mortgage, or a deed in trust.

An acknowledgment of a trust, lawfully made, is irrevocable. Now the acknowledgment by the United States, in the act of March 3, 1891, that the cession of 1866 was a cession in trust, was at once an interpretation of that cession and also an acknowledgment of a trust. As a mere interpretation of the cession, it was subject to repeal by Congress. But, as a matter of fact, it has never been repealed. Congress did, in effect, in the joint resolution of December 17, 1892, declare that this interpretation should not "be held in any way to commit the government to the payment of any further sums to the Choctaw and Chickasaw Indians, for any alleged interest in the remainder of the lands situate in what is commonly known and called the leased district." This did not revoke the interpretation. Its only effect was to provide

that the interpretation should not, of itself, commit the government to further payments. That is to say, it left the door open for any defences which might be made to such payments, notwithstanding this interpretation. And there might have been scores of such defences based on the relations, old or new, between the United States and the Choctaws and Chickasaws, the Wichita and affiliated bands, the Kiowas and Comanches and Greer County, and, also, on the relations between the Choctaws and Chickasaws and the Wichita and affiliated bands, the Kiowas and Comanches and Greer County.

But, as an acknowledgment of a trust, this action of congress is, like any other acknowledgment of a trust legally made, absolutely irrevocable. Mr. Binney, on page 37 of his "reply brief," says:

> The Paine brief (pp. 28, 29) relies on the supposed legal effect of the act of 1891, as an acknowledgment of a trust, by a trustee. Granting all the authorities cited state, there is no authority for holding that when the one who has made such an acknowledgment realises that he was mistaken, he cannot afterwards cancel or withdraw the acknowledgment, or declare that it shall not be taken to affect any other property than that in regard to which it was specifically given.

As I have just shown, the joint resolution of December 17, 1892, only provided that the acknowledgment of 1891 should not of itself countervail any defences which might be set up against further payments. It did not purport to "cancel or withdraw the acknowledgment," but merely declared that it should not have any effect to close the door to any one of numerous possible defences.

But suppose that, in this joint resolution, congress had expressly spoken as follows: "The acknowledgment of a trust, made in the act of March 3, 1891, is hereby revoked." Would that have been effectual to revoke the trust? Is it possible that the United States, after voluntarily entering a court of equity, can trample under foot the rules of equity which govern private litigants? As

between the grantor and grantee, is not the written acknowledgment of the trustee conclusive and irrevocable proof of the trust? As between the grantor, grantee and *cestui que trust*, is not the trust an integral part of the deed itself? If, as in the case at bar, it import that the trust is coeval with the deed, will not the trust be a part of the deed itself, from its date, as certainly as if originally incorporated into the written instrument? If the written instrument create as well as prove the trust, will not the trust, from the date of the acknowledgment, be an inseparable part of the deed? Can the trustee change his mind and tear it from the deed? Is not his relation to the deed exactly what it would be, if he had been designated as trustee, in the deed itself? Is an acknowledgment of a trust mere testimony subject to correction by the witness? Is it a promise unsupported by a consideration and revocable at pleasure? When the trust acknowledged is coeval with the deed, is not the acknowledgment a binding recognition of an obligation for which the grant constitutes an unquestionable consideration? When the trust is created, as well as proved, by the acknowledgment, is not the grant a sufficient consideration to support the undertaking of the trustee? Does not an acknowledgment that a deed is a conveyance in trust amount to *contract* as well as *testimony?*

But, then, it is not to be forgotten that this acknowledgment of the trust, which was made by the 51st congress, was, after the most searching investigation, ratified by the 52d congress, by a vote approaching closely to absolute unanimity. President Harrison, prompted by Secretary Noble, refused to permit the money appropriated by the 51st congress, to be paid to the Choctaws and Chickasaws. In his special message on the subject to the 52d congress, he stated the reasons of his refusal,

premising that "after a *somewhat* careful examination of the question," he did not believe that the cession was a cession in trust. These reasons are all exhaustively considered in the senate report which is printed on pages 187 to 240 of the Appendix to the Record. An examination of that report will enable the court to understand how thorough was the investigation by the senate, and also how "careful" was the president's "examination" of the subject. With the report the committee submitted the following resolution:

Resolved, That for reasons set forth in the report of the Committee on Indian Affairs upon the president's message of February 18, 1892, upon the appropriation of March 3, 1891, for payment to the Choctaw and Chickasaw nations for their interest in the Cheyenne and Arapahoe reservation, in the Indian Territory, submitted with this resolution, that it is the opinion of the Senate that there is no sufficient reason for interference in the due execution of the law referred to.

The debate commenced April 27, 1892; and on the 9th of May the senate came to a vote. An amendment was proposed as follows:

Provided, however, that, in the opinion of the senate, the president should require the leases and the conveyances, which shall be executed by the Choctaw and Chickasaw nations of Indians, mentioned in said appropriation, to contain a full and complete relinquishment of all the right, title, interest, and claim of said nations of Indians in and to all the lands between the 98th and 100th meridians of west longitude, formerly owned by them, and of all claim to reimbursement and compensation for and on account of the same.

This amendment was rejected by a vote of yeas 13, nays 41. The resolution was then adopted by a vote of yeas 43, nays 13. Cong. Rec. 52d Cong. 1st sess., p. 4093. The house of representatives by a vote of yeas 163, nays 47, adopted a resolution in the identical words of the senate resolution.

IV.

Ratification of the Spanish Treaty.

Mr. Binney, in his oral argument, asserted that the senate did not, on the 19th of February, 1821, advise the president to ratify the Spanish treaty; but did advise the senate to exchange with Spain prior ratifications of the treaty. This was a strange misunderstanding of the facts of history. The senate resolution of February 19, 1821, advising the second ratification of the treaty, as originally reported by the committee, was framed as follows:

> Resolved, (two-thirds of the senators present concurring therein) That the senate do advise and consent to the ratification of the treaty of amity, settlement, and limits, made and concluded at Washington, on the 22d day of February, in the year of our Lord 1819, between the United States of America and his Catholic Majesty.

As adopted by the senate, the resolution took the following form:

> Resolved, (two-thirds of the senators present concurring therein) That the senate, having examined the treaty of amity, settlement, and limits, between the United States of America and his Catholic Majesty, made and concluded on the 22d of February, 1819, and seen and considered the ratification thereof, made by his said Catholic Majesty, on the 24th day of October, 1820, do consent to and advise the president of the United States to ratify the same.

There may possibly be room for doubt whether the resolution, in its original form, required a *subsequent* ratification by the president. The words were: "Resolved, That the senate do advise and consent to the ratification of the treaty." There is, however, no room for doubt as to the import of the resolution actually adopted. The senate obviously consented to and advised a *subsequent* ratification. The words of the resolution are: "Resolved, That the senate do consent to and advise the president of the United States to ratify the same."

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V.

Compensation for land west of one hundredth meridian.

On page 16 of Mr. Binney's "reply brief," referring to the land west of the 100th meridian, he insists that if the Choctaws had any right to that land *in specie*, the Chickasaws had the same right, because, as he alleges, the United States, by approving the agreement of 1837 between the Choctaws and Chickasaws, had practically granted that right directly to the Chickasaws, and, therefore, the three facts (1) that the Chickasaws did not join in the quit-claim, (2) that they received one-fourth of the $800,000, and (3) that they were owners of one-fourth in common of the leased district, show that the entire sum of $800,000 was, in fact, paid for the leased district.

But the truth is this: On the 19th of February, 1821, the United States sold this land out from under the Choctaw nation to Spain. This sale was valid; for Spain was a sovereign state invested with the power of eminent domain. The Choctaw title to the land *in specie* was thereby divested. The right to compensation for the land took the place of the land itself. In 1837 the Chickasaws purchased certain interests from the Choctaws, which included one undivided fourth part of this right to compensation for the land. When the quit-claim of 1855 was executed, the Chickasaws, having never had any right to the land *in specie*, had no place, as grantors, on the quit-claim. But they were entitled to one-fourth of the compensation for the quit-claim, as well as to one-fourth of the compensation for the lease, and, therefore, were entitled to receive and did receive one-fourth of the entire sum of $800,000.

VI.

Import of the word "Cede."

On page 17 of Mr. Binney's "reply brief," he says that the word "cede" is "the word regularly used by nations, in transferring territory, and conveys whatever rights the nations have in such territory." In his oral argument, he also said that the word "cede" conveyed whatever the ceding party had power to cede.

This is obviously erroneous. When the United States ceded to the Choctaws the land in controversy, the United States held the right of paramount dominion in that territory, and could have ceded it to the Choctaws. But the word "cede" did not convey that right. When France ceded Louisiana to the United States, France had the right to cede any and all private property in that province; but the word "cede" did not convey that private property. When Spain ceded Louisiana to France, in 1800, Spain had the right and power to cede any and all private property in Louisiana; but the word "cede" did not convey that property. When Spain ceded Florida to the United States, in 1820, Spain had the right and power to cede all private property in Florida; but the word "cede" did not convey that property.

But then the next sentence in Mr. Binney's brief exposes the error of his contention that the word "cede" *per se* imports a conveyance of whatever the grantor has power to convey. He says of this word "cede" that, "when used of grants by the United States to Indians, it does not import the conveyance of more than a full Indian title." This of course means that the word "cede" imports sometimes one thing and sometimes another; that it does not *always* convey all the ceding party has the power to convey; that it does not *per se* convey an absolute title. And therefore in order to ascertain its meaning, in a particular

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case, recourse must be had to the context, or to outside facts. In order to ascertain its import in a cession to Indians, it is necessary to have recourse to outside facts,—to the relations of the parties, which, when scrutinized, show that the word "cede" does not *per se* convey to them either paramount dominion, or absolute titles to property. And so the counsel undermines and overthrows his own position.

VII.

Requirement of the "third stipulation."

On page 18 of Mr. Binney's "reply brief," he refers to my statement that the sum of $300,000, if it was ever to be paid to the Choctaws and Chickasaws, was to be paid to them for the grant of citizenship and forty acres of land to each of their freedmen, and he says:

> This bold assertion wholly overlooks the fact that the third stipulation required that the freedmen should be incorporated "into the tribes, on an equal footing with the original members [*i. e.*, on an equality as to citizenship, land ownership and suffrage] or suitably provided for," without the payment of any consideration whatever by the United States, and that this stipulation was literally complied with by the Creeks, Cherokees and Seminoles, without any compensation.

Does not the counsel perceive that this requirement of the third stipulation is an alternative requirement? Does he not see that this stipulation requires the Chickasaws to do one of two things, *either* to grant citizenship and land to their freedmen, or otherwise *suitably to provide for them?* Does he not know that, although the Chickasaws refused to grant citizenship and 40 acres to them, they have, for a period of 33 years since 1866, furnished all their freedmen with all the land they have chosen to cultivate or use? Is he oblivious of the fact that, if the Seminoles and Creeks have granted citizenship and lands to their freedmen without compensation therefor, so also have the Chickasaws made suitable provision for their freedmen, by giving them, without compensation, all the land they wanted free from rent and taxes for 33 years?

Mr. Binney, as I have said, denies that the sum of $300,000 was offered to the Choctaws and Chickasaws, as compensation for the grant of citizenship and forty acres of land to each of their freedmen. He thinks the treaty required the Choctaws and Chickasaws to make the grant a gratuitous grant. He considers this a justifiable penalty for disloyalty. At the same time he asks that you award the entire Wichita reservation to the Wichita and affiliated bands, who made their treaty with the Confederate States on the 12th of August, 1861. You are asked to *punish* the Choctaws and Chickasaws for disloyalty, by confiscating, for the benefit of the 9,000 freedmen enrolled by the Dawes Commission, 360,000 acres of their land outside the leased district, and by confiscating, for the benefit of the Wichita and affiliated bands, 7,000,000 acres of their land in the leased district. But, at the same time, you are asked to *reward* the disloyalty of the Wichita and Affiliated Bands by awarding to them 7,000,000 acres of land in the leased district. Justice would seem to be "out of joint" in the mind of the counsel.

But is it true that the sum of $300,000 was not to be paid to the Choctaws and Chickasaws, as compensation for the grant of citizenship and forty acres of land to each of their freedmen? Did not the United States, in the treaty, say, in effect, this: If within two years you give citizenship and forty acres of land to each freedman, you shall have the $300,000; but if you do not, you shall not have that money? Is the import of that language doubtful? Did not the United States also say: If your freedmen leave your country they shall have the $300,000; but if they refuse to go and you refuse to grant to them citizenship and land the money shall be the property of the United States? Has the English language lost its identity?

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